

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

David Osmek,

Complainant,

vs.

John McKinley,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
NOTICE OF AND ORDER FOR
EVIDENTIARY HEARING**

TO: David Osmek, [Street Address Redacted], Mound, MN 55364; and John McKinley, [Street Address Redacted], Mound MN 55364.

On February 4, 2009, David Osmek filed a campaign complaint with the Office of Administrative Hearings alleging that John McKinley violated Minnesota Statutes §§ 211A.02 by failing to file accurate and complete campaign financial reports, and 211B.04 by failing to put disclaimers on campaign material relating to his November 2008 campaign for mayor of the city of Mound.

Following a review of the Complaint and attached documents, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of Minnesota Statutes § 211A.02. The alleged violations of Minnesota Statutes § 211B.04 are dismissed. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the

unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55101, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: February 9, 2009

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

Complainant David Osmek is a current member of the Mound City Council. Respondent John McKinley ran unsuccessfully for mayor of Mound in the November 2008 election. He was defeated by incumbent candidate Mark Hanus who received approximately 49 percent of the vote to Mr. McKinley's 37 percent.¹

The Complaint alleges that Mr. McKinley violated Minn. Stat. § 211A.02 by failing to list on his campaign financial reports expenditures he made for food served at a "Meet and Greet" he held on October 16, 2008; rebar and zip ties used for campaign signs; a campaign advertisement in the local *Laker* newspaper; and the registration of his domain name and other "associated web development costs" used for his campaign.² The Complainant estimates the cost of the rebar to be approximately \$47.80 and the cost of the *Laker* advertisement to be \$233.49.

¹ Minnesota Secretary of State's website. (Another candidate, Cheryl Martin, received approximately 14 percent of the vote.)

² Allegations # 2,3,4 and 7 of Complaint; Exs. A-C attached to Complaint.

Minn. Stat. § 211A.02, subd. 1, requires candidates who receive contributions or makes disbursements of more than \$750 in a calendar year to file campaign financial reports listing, among other things, the total amount of receipts and expenditures made during the period of time covered by the report. The Complainant attached to the Complaint three reports filed by Mr. McKinley covering time periods from October 1, 2008, through November 11, 2008. None of the alleged expenditures identified by the Complainant are listed on these reports.

For purposes of a *prima facie* determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.³ In deciding whether a campaign complaint sets forth a *prima facie* violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible. The Administrative Law Judge concludes that the Complainant in this matter has alleged sufficient facts to support finding *prima facie* violations of Minn. Stat. § 211A.02 against the Respondent with respect to his campaign financial reporting. Therefore, these allegations will proceed to an evidentiary hearing to be scheduled in the near future.

The Complainant also notes in his Complaint that Mr. McKinley failed to sign and date the Campaign Financial Report Certification of Filing that candidates are required to submit no later than seven days after the general or special election.⁴ On this report, candidates or committees affirm either that they have submitted all required campaign financial reports, or that they did not receive contributions or make disbursements exceeding \$750 in the calendar year. The Complainant argues that the lack of a date and signature on Mr. McKinley's certification of filing renders the form incomplete and amounts to a failure to file the certification in violation of the reporting requirements under Minn. Stat. § 211A.02.

Minn. Stat. § 211A.05 governs the penalty and process for candidates and committees who fail to file financial reports required by Minn. Stat. § 211A.02. Minn. Stat. § 211A.05, subd. 2 provides as follows:

If a candidate or committee fails to file a report on the date it is due, the filing officer shall immediately notify the candidate or committee of the failure to file. If a report is not filed within ten days after the notification is mailed, the filing officer shall file a complaint under section 211B.32.

The process provides only for filing officers to file complaints when candidates or committees fail to file financial reports required by § 211A.02, and the statute specifies that such complaints must be filed only ten days after the filing officer has sent written notification to the candidate or committee of the failure to file. Based upon the language of Minn. Stat. § 211A.05, the Administrative Law Judge concludes that the Complainant lacks standing to allege this violation in his Complaint. Moreover, there is no evidence that the filing officer for the city of Mound notified Mr. McKinley of his alleged failure to

³ Minn. Stat. § 211B.32, subd. 3.

⁴ Minn. Stat. § 211A.05, subd. 1.

file a complete certification of filing. The Administrative Law Judge concludes that the Complainant has failed to allege a *prima facie* violation of Minn. Stat. § 211A.02 with respect to this claim and this allegation is dismissed.⁵

The Complaint also alleges that the Respondent failed to affix the proper disclaimer on campaign flyers and on his campaign website in violation of Minnesota Statutes § 211B.04.⁶ On April 26, 2006, the Minnesota Court of Appeals issued its decision in *Riley v. Jankowski*,⁷ holding that the disclaimer requirement of Minnesota Statutes § 211B.04 violates the First Amendment of the U.S. Constitution by directly regulating the content of pure speech and that there is no way to narrowly construe the statute to avoid the constitutional violation. Because the Minnesota Court of Appeals has determined that Minn. Stat. § 211B.04 is unconstitutional on its face, and therefore unenforceable, these allegation are dismissed.

Because the Administrative Law Judge has determined the Complainant has alleged *prima facie* violations of Minn. Stat. § 211A.02, this matter will be referred to the Chief Administrative Law Judge for assignment of a three-judge panel. An order scheduling this matter for a telephone pre-hearing conference and evidentiary hearing will issue in approximately two weeks.

E. L. L.

⁵ Complaint allegation #1.

⁶ Complaint allegations #5 and #6.

⁷ 713 N.W.2d 379, 401 (Minn. App. 2006), *rev. denied* (Minn. July 20, 2006).